



Kagio v Kieleko; Ndung'u & another (Interested Parties) (Environment & Land Case 177 of 2011) [2022] KEELC 13775 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13775 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 177 OF 2011
JO MBOYA, J
SEPTEMBER 22, 2022**

BETWEEN

EDWARD MWANGI MACHARIA KAGIO PLAINTIFF

AND

ROSE KIELEKO DEFENDANT

AND

JOSEPH NG'ANG'A NDUNG'U INTERESTED PARTY

DAVID MUKUI MUNYUKI INTERESTED PARTY

JUDGMENT

Introduction and Background

1. Vide the Complaint dated the April 20, 2011, the Plaintiff herein has approached the court seeking for the following Reliefs;
 - I. Vacant possession of the suit Plots.
 - II. Permanent Injunction restraining the Defendant either by herself, officers, Agents, Servants, Employees or Persons acting on her behalf, in any other way howsoever from taking possession of, constructing, leasing, parting possession with or in any other manner dealing with that parcel of Land known as LR No 6845/170 Embakasi – Utawala Village.
 - III. A Mandatory Injunction compelling the Defendant either by herself, officers, agents, servants, employees or in any other way howsoever to remove all the fixtures, Structures and fittings erected on the Suit Property.
 - IV. General Damages for illegal possession.



- V. Cost of the suit
2. Upon being served with the Plaint and the summons to enter appearance, the Defendant herein duly entered appearance and thereafter filed a Statement of Defense and Counterclaim. For clarity, the Statement of Defense and Counterclaim was filed on the February 15, 2013.
 3. It is imperative to appreciate the nature of the Reliefs and/or claim sought at the foot of the Counterclaim. Consequently, the reliefs sought are reproduced as hereunder.
 - a. Declaration that the Defendant is the owner of Plots numbers 15 and 17 in LR No 6845/170.
 - b. An order of Specific Performance do issue directing the Plaintiff to transfer Plots Numbers 15 and 17, in LR No 6845/170 to the Defendant failure to which the Deputy Registrar of this Court do execute the necessary Documents of Transfer.
 - c. The Plaintiff do pay costs of the Suit and Counter-claim.
 - d. Any other Order or Relief this court may deem just and expedient.
 4. Subsequently, the Plaintiff filed a Reply to Defense and Defense to the Counterclaim dated the February 26, 2013, vide which the Plaintiff acknowledged having entered into a Sale transaction with the Defendant, but however contended that the Defendant did not complete the payment of the total purchase price agreed upon.
 5. Other than the foregoing, the 1st and 2nd Interested Parties sought for and obtained Leave of the Court to be joined in the subject matter as Interested Parties and upon being joined as such, both Interested Parties proceeded to and filed what is termed as Interested Parties Statement of Defense.
 6. For coherence, the 1st Interested party filed (sic) a Statement of Defense dated the July 3, 2015 and in respect of which same contended that he (1st interested party) is the lawful and legitimate owner of the suit Properties.
 7. Pursuant to (sic) the 1st Interested Party's Statement of Defense, same has sought that the Honourable court be pleased to declare him as the Beneficial owner of the suit Properties.
 8. On the other hand, the 2nd Interested Party filed (sic) a Statement of Defense dated the September 16, 2021 and in respect of which same also sought to be declared to be the lawful owner of the suit Property herein.
 9. Though the Interested Parties herein filed documents described as Statement of Defense, it is apparent that the Plaintiff herein never filed any Responses and or Replies to the said (sic) Statements of Defence.
 10. Premised on the foregoing, the pleadings referred to and or quoted in terms of the preceding paragraphs constitutes to the totality of the Pleadings by and/or on behalf of the Parties herein.

Evidence by the Parties.

a. Evidence by the Plaintiff:

11. The Plaintiff herein testified as PW1 and the same was the sole witness on behalf of the Plaintiff.
12. According to the Plaintiff herein, same purchased the suit property, namely, LR No 6845/170 Embakasi – Utawalla Village from a Company known as Njiru Githungui Farm Ltd on or about the year 1998. However, the witness further stated that despite purchasing the suit property as aforesaid, the formal transfer in respect thereof has not been done and or completed.



13. Further the witness stated that even though the transfer has not been done, same was issued with Share Certificate awaiting Formal transfer.
14. On the other hand, the witness testified that upon purchase of the suit property, same immediately entered upon and took possession of the suit property and commenced to subdivide same into various Plots with the intention of selling to Third Parties after transfer from Njiru Githungui Farm Ltd.
15. Other than the foregoing, the witness also testified that on or about the year 2003, same was approached by a Lady, namely, Rose Kieleko, who is now the Defendant and who expressed an Interest to buy some of the subdivided plots, arising from the suit property. For clarity, the witness clarified that the Defendant was interested in purchasing the said plots Numbers 15 & 17 in that regard.
16. Pursuant to the interests by the Defendant, the witness testified that same and the Defendant commenced negotiations pertaining to and or concerning the sale of the two Plots.
17. Further the witness stated that upon the conclusion of the negotiation, an Agreement was reached and/or arrived at whereupon same mutually agreed that the total purchase price would be Kshs 325, 000/0 Only.
18. Besides, the witness also testified that after reaching the agreement, the Defendant herein paid unto him (Plaintiff) the sum of Kshs 209, 000/= only, which payment was duly acknowledged vide a Written Memorandum.
19. Further, the witness testified that after the payment of the sum of Kes 290, 000/= Only, there remained a balance of Kes 35, 000/= which amount was agreed to be paid latter.
20. Other than the foregoing, the witness added that even though the Defendant did not pay the balance of the purchase price, either as agreed or at all, same entered upon the said Suit plot and commenced to carry out and/or undertake illegal transactions on the suit Plots.
21. Nevertheless, the witness pointed out that to date same (the witness) has never transferred the Suit Plots to and in favor of the Defendant.
22. Other than the foregoing testimony, the witness pointed out that same had filed a list and bundle dated the April 20, 2011 containing Five Documents and which Documents, the Witness sought liberty to adopted and rely on.
23. Suffice it to point out that the Documents at the foot of the List dated the April 20, 2011, were thereafter admitted in Evidence and produced as exhibits P1 to P5, respectively.
24. On cross examination by the 1st Interested Party, the witness conceded that same had indeed sold the two plots to the Defendant, but however the Defendant did not complete the payment in respect of the Purchase price.
25. Besides, the witness herein stated that same knew the 1st Interested Party and that indeed same had entered into a Sale Agreement with the 1st Interested Party in October 2007. For clarity, the witness pointed out that the 1st Interested Party paid the entire Purchase price.
26. While under further cross examination by counsel for the 1st Interested Party, the Witness admitted that upon receipt of the Full purchase price from the 1st Interested Party, same issued the requisite certificate of sale to the 1st Interested party.



27. Further, the witness herein also stated that upon receipt of the full purchase price, same was obliged to transfer the Suit plots to the 1st Interested Party, but however the suit plots have not been transferred to the 1st Interested Party.
28. Besides, the witness herein admitted that the title deed/certificate of title over and in respect of the suit property, wherein the suit plots have been located has not been issued to him.
29. It was the further testimony of the witness that same entered into the second agreement with the 1st Interested Party because the Defendant did not fully pay and/or settle the agreed Purchase price.
30. On the other hand, whilst under cross examination by counsel for the 2nd Interested Party, the witness stated that the 2nd Interested Party is a stranger and that same has never had any dealing and/or transaction with the 2nd Interested party.
31. Further, the witness stated that despite not having entered into any transaction with the 2nd Interested Party, same is laying a claim to the suit plots, albeit without lawful basis.
32. The witness further stated that the structures constructed on the suit plots, was constructed by the Defendant and not the 2nd Interested Party.
33. At any rate, the witness further stated that even though there was a sale transaction between himself and the Defendant, there was no formal agreement entered into or signed by the Parties.
34. Nevertheless, the witness conceded that an acknowledgement was prepared and same was duly signed, confirming the total amount of money that was paid by the Defendant.
35. Be that as it may, the witness also admitted that one David Mukui Munyoki signed the written acknowledgement as a witness, but despite signing as such witness to the acknowledgement, the witness herein maintained that the 2nd Interested Party was not known to him.
36. Further, the witness herein stated that the sum of Kshs 290, 000/= only being part of the purchase price was paid to him by the Defendant and not the 2nd Interested party.
37. However, the witness proceeded and confirmed that he did not transfer the two plots to the Defendant and neither did he issued any title document to the Defendant.
38. In any event, the witness maintained that he thereafter sold the suit plots to the 1st Interested Party, because the Defendant had breached the terms of the Sale Contract.
39. Further, the witness indicated that the balance of Kes 35, 000/=- only, was to be paid by the Defendant latter. Nevertheless, the witness maintained that latter meant immediately.
40. Other than the foregoing, the witness admitted that prior to and/or before selling the two plots to the 1st Interested Party, same did not issue any termination notice to the Defendant.
41. Besides the witness pointed out that he just terminated the Sale agreement without giving Notice to the Defendant.
42. It was the further testimony of the witness that the suit plots now belong to and are the properties of the 1st Interested Party.
43. Other than the foregoing, the witness herein also stated and acknowledged that though the suit property is currently registered at the land registry, same did not bring forth any Evidence of such registration, including any Green card or Certificate of official search.



44. Besides, the witness herein also admitted that same did not bring forth and or show unto to the Honourable court any evidence to confirm that the suit property is lawfully registered in his name.
45. Despite having stated that the suit plots currently belong to the 1st Interested Party, the witness herein further stated that the two plots indeed belong to him.
46. On re-examination, the witness stated that the suit property belongs to his Father, but he is the one who has rights over and in respect of the suit property.
47. Further, the witness herein also stated that even though the land belongs to his Father, he has not placed any evidence before the Honourable court to show that same had any authority to deal with and/or transact over the suit property.
48. Other than the foregoing, the witness also stated that if the Defendant had fully paid the Purchase price, same would have issued share certificate to the Defendant and similarly, same would have placed the Defendant in possession of the suit plots.
49. Finally, the witness stated that he indeed issued and served a Termination Notice upon the Defendant, but conceded that no such termination notice was availed to the court.
50. With the foregoing testimony, the Plaintiff's case was duly closed.

a. Defendant's Case:

51. Though the Defendant duly entered appearance and filed a Statement of Defense and counterclaim, the Defendant herein neither attended court nor tendered any evidence at all.
52. In the premises, the Defendant's case was closed without any evidence being tendered and or adduced at all.

b. 1st Interested Party's Case:

53. The 1st Interested Party's case revolves around the written statement dated the July 3, 2015 and in respect of which same has contended that he entered into a land transaction with the Plaintiff herein, whereupon the Plaintiff sold to and unto him two plots, namely LR No's 6845/170/15 and 6845/170/17, respectively.
54. Further, the 1st Interested Party also testified that following the completion of the negotiations in respect of the two plots, the Plaintiff and himself entered into and executed a formal sale agreement dated the October 25, 2007.
55. On the other hand, the witness further testified that he paid to and in favor of the Plaintiff the entire purchase price and there after same entered upon and took vacant possession of the two plots.
56. Premised on the foregoing, the witness has pointed out that same became the lawful and beneficial owner of the two plots, which are the subject of the suit herein.
57. Other than the foregoing, the witness testified that as at the time when same bought the two plots and entered into the sale agreement with the Plaintiff, same was not aware of the Defendant's claim to and in respect of the suit Plots.
58. Be that as it may, the Witness has testified that same became aware of the Interest of the Defendant on the suit properties in the year 2011, when he learnt of the case herein, which was going on and touching on the two plots in question.



59. On the other hand, the witness further testified that same has filed various documents before the Honourable court showing how he bought and/or purchased the two plots. In this regard, the witness has contended that same is therefore the legitimate and beneficial owner of the suit plot.
60. Further, the witness has also testified that despite being the owner of the suit Plots, the Defendant herein entered upon and took possession of the two plots, illegally and without his permission, consent and/or authority.
61. In the premises, the witness has testified that the Defendant herein has no lawful rights or Interests to and in respect of the suit plots.
62. Other than the foregoing, the witness herein alluded to his Witness statement dated the July 3, 2015 and sought to adopt and rely on same in its entirety. For coherence, the Witness Statement herein, was duly admitted as the Further Evidence- in – Chief of the Witness.
63. Besides, the witness herein also referred to the List and Bundle of documents dated the July 3, 2015 and sought for leave to use same as exhibit. For clarity, the documents at the foot of the list of documents were duly produced as exhibit 1 and 2 on the part of the 1st Interested Party.
64. It is imperative to note that the witness herein was not cross examined by the either the Plaintiff or the 2nd Interested Party. For the avoidance of doubt, both counsel indicated that same had no questions for the witness.

c. 2nd Interested Party's Case:

65. The 2nd Interested Party's case is premised and/or revolves around the witness statement dated the September 16, 2021 and which was duly filed before the Honourable court.
66. It was the 2nd Interested Party's case that himself and the Defendant herein entered into negotiations with the Plaintiff pertaining to and concerning the purchase and acquisition of the suit plots.
67. Further, the witness stated that the Defendant herein is his lawful wife and that at the time of purchasing the two plots same were living and cohabiting together.
68. Nevertheless, the witness continued and stated that the Defendant and himself are currently estranged and that it is him, the 2nd Interested Party, who is residing on the two plots.
69. Further, the witness testified that the agreement in respect of the two Plots was to the effect that the Total purchase price was agreed at in the sum of Kshs 325, 000/= only, whereby the sum of Kshs 290, 000/= Only, was paid to and acknowledged by the Plaintiff.
70. At any rate, the witness testified that though the sum of Kshs 290, 000/= Only, was paid by the Defendant, same was however procured and obtained by himself courtesy of a Loan obtained from Kenya Bankers Sacco.
71. It was the further evidence of the witness that thereafter, same procured another loan facility from National Bank of Kenya and Co-operative Bank Ltd, respectively, and which same used to construct and/or build the house, which is currently standing on the suit plot.
72. Besides, the witness also testified that same is currently residing and/or living on the suit plots with the children of the Marriage, which fact is known to the Plaintiff herein.



73. Premised on the foregoing, the witness also testified that same therefore has an Interest over and in respect of the suit Plots. Consequently, the witness has contended that the Plaintiff's claim to and in respect of the suit plots ought to be dismissed.
74. Other than the foregoing, the witness alluded to the List and Bundle of documents dated the September 16, 2021 and sought to have the said documents produced as exhibits.
75. Pursuant to the request by the 2nd Interested Party, the documents at the foot of the List dated the September 16, 2021, were produced and marked as Exhibits 3 to 10, respectively.
76. On cross examination by counsel for the Plaintiff, the witness herein pointed out that same did not file a statement of defense, but that the Statement of Defense was filed by the Defendant, who is his wife.
77. Nevertheless, the witness conceded that the Defendant is currently not staying with him and that same are currently estranged.
78. Further, the witness stated that same has produced the hand-written Agreement/acknowledgment relating to the payment of the sum of Kshs 290, 000/= Only, which was paid to the Plaintiff and that the said document contained his name as a witness.
79. Other than the foregoing, the witness stated that though he signed the said hand-written document, the money was however paid by the Defendant and that the receipt was only issued in favor of the Defendant and not otherwise.
80. On the other hand, the witness herein confirmed that there was a balance of Kshs 35, 000/= only but the said balance was to be paid latter.
81. Nevertheless the witness clarified that no duration was stipulated and/or provided and that in any event, the balance of Kshs 35, 000/= only, was to be paid when the Plaintiff was presenting the Title deeds in respect of the two plots.
82. Other than the foregoing, the witness herein acknowledged that the receipts for development and construction that were produced by himself, were not in his name but in the name of the Defendant.
83. As concerns the claim, that same procured and obtained a loan facility from National Bank of Kenya Ltd, the witness herein admitted that the application for the loan facility, was however in the name of the Defendant.
84. On cross examination by counsel for the First Interested Party, the witness stated that same was not aware that the 1st Interested Party had bought and/or purchased the suit plots.
85. Further, the witness contended that same is lawfully married to the Defendant, but nevertheless admitted that he had not brought forth a copy of the Marriage certificate.
86. On re-examination, the witness reiterated that the two plots were bought jointly by the Defendant and himself, but conceded that the transaction documents only reflects the name of the Defendant.
87. In respect of when the balance of the purchase price of Kshs 35, 000/= Only, was to be paid, the witness stated that there was no time line that was fixed.
88. Further, the witness herein clarified that same has been staying and/or residing on the suit plots since the year 2003 and reiterated that same has built a Servant Quarter on the suit Property.
89. Further, the witness stated that the Plaintiff herein neither issued nor served any termination in respect of the Sale agreement relation to the two plots.



90. Finally, the witness herein acknowledged that the hand-written Agreement relating to the sale of the two plots and wherein receipt of Kshs 290, 000/= Only, was acknowledged, does not reflect who was the vendor and the purchaser. For clarity, the witness pointed out that all the Parties thereto are designated as witnesses.

91. With the foregoing, the 2nd interested party's case was closed.

Submissions by the Parties:

a. Plaintiff's Submissions:

92. The Plaintiff filed written submissions dated the April 4, 2022 and raised three pertinent issues.

93. First, the counsel for the Plaintiff submitted that the evidence tendered by the Plaintiff herein, pertaining ownership of the suit plots, the division thereof into various plots and by extension of the Plaintiffs rights to the suit property, had not been controverted.

94. Premised on the foregoing, counsel for the Plaintiff has thus submitted that to the extent that the Plaintiff's Evidence had not been controverted, the Plaintiff's case stands proved and hence the Plaintiff is entitled to the reliefs sought.

95. Secondly, counsel for the Plaintiff has submitted that though the Defendant herein duly entered appearance herein and filed a Statement of Defense and Counterclaim, the Defendant did not attend court to adduce evidence and that in the absence of any evidence, the Defendant's Counter-claim remains bare statement.

96. Owing to the fact that no Evidence was adduced by the Defendant, the Plaintiff has therefore submitted that the Defendants Counter-claim ought to be Dismissed.

97. Thirdly, the Learned counsel for the Plaintiff has submitted that the 2nd Interested Party neither entered into any sale transaction nor paid any monies to the Plaintiff. In this regard, counsel for the Plaintiff contended that the 2nd Interested party therefore has no lawful claim over and in respect of the suit plots or at all.

98. Consequently, Learned Counsel for the Plaintiff submitted that the claim by the 2nd Interested Party is therefore premature and misconceived.

99. As a result of the foregoing, counsel for the Plaintiff has therefore implored the Honourable court to find and hold that the Plaintiff has proved his case on a balance of probabilities and same is therefore meritorious.

100. In support of the foregoing submissions, Learned Counsel for the Plaintiff has cited and relied on various decisions, including *Njoki Kamau & Another versus Eliud Mburu Mwaniki (2021)eKLR*, *Edward Muriga, Suing through Stanely Muriga versus Nathaniel D Schuler, Civil Appeal No 23 of 1977,(Unreported)*, *Raila Amolo Odinga & Another versus IEBC & 2 Others (2017)eKLR* and *Francis Kariuki Muruatetu & Another versus Republic & 5 Others (2016)eKLR*.

a. Defendant's Submissions

101. Similarly, the Defendant herein did not file any Written submissions, just as same neither tendered nor adduced any Evidence before the Honourable court.



b. Submissions by the 1st Interested Party:

102. At the close of the hearing of the subject case, the advocate for the respective Parties agreed to file and exchange Written submissions within set timelines. Thereafter the court listed the matter for mention on the May 3, 2022.
103. Come the scheduled Mention dated, only the Plaintiff had filed and served his written submissions. In this regard, the counsel for the 1st and 2nd Interested Parties sought for and were granted further liberty to file and serve written submissions.
104. On the other hand, the subject matter was thereafter set down for mention on the June 13, 2022, for purposes of confirming compliance on the part of the 1st and 2nd Interested Parties.
105. However, when the matter herein was called out on the said date, counsel for the 2nd Interested Party and the Plaintiff confirmed having filed and served their written submissions.
106. Nevertheless, counsel for the 1st Interested Party indicated that yet again same had not filed his written submissions and therefore same was desirous to be granted further latitude.
107. Despite there being no plausible explanation as to why counsel for the 1st Interested Party had not filed written submissions, the Honourable court proceeded to and indulged counsel for the 1st Interested Party.
108. Premised on the foregoing, the matter herein was taken out and listed for further mention on the July 14, 2022, with liberty to the 1st Interested Party to file and serve his written submissions.
109. Be that as it may, on the return date, the July 14, 2022, the counsel for the 1st Interested Party still had not filed his written submissions. In any event, the said counsel also did not attend court.
110. In the circumstance, no written submissions were filed by and/or on behalf of the 1st Interested Party.

c. Submissions by the 2nd Interested Party

111. The 2nd Interested Party filed written submissions dated the July 13, 2022, and in respect of which same raised four issues for consideration.
112. First and foremost, the 2nd Interested Party contended that upon the purchase of the suit plots from the Plaintiff herein, via the written memorandum dated the July 7, 2003, same entered upon, took possession of and constructed on the suit plots.
113. In this regard, the 2nd Interested Party has therefore submitted that same is lawfully in occupation and possession of the suit plots, wherein same stays with the children of the Marriage between himself and the Defendant.
114. Secondly, the 2nd Interested Party has also submitted that after the payment of the sum of Kshs 290,000/= only, to and in favor of the Plaintiff, which payment was duly acknowledged and confirmed vide the written memorandum, there exists a lawful contract between the Plaintiff and the Defendant.
115. In particular, counsel for the 2nd Interested Party has further contended that the valid Contract between the Plaintiff and the Defendant herein, has never been terminated and/or repudiated.
116. Thirdly, counsel for the 2nd Interested Party has submitted that despite having entered into a lawful contract with the Defendant, the Plaintiff herein has failed and/or neglected to hand over the title documents to the Defendant and the 2nd Interested party.



117. At any rate, counsel for the 2nd Interested Party has submitted that the actions and/or activities by the Plaintiff, including the purported sale of the suit plots to the 1st Interested Party constitutes breach of the contract between the Plaintiff and the Defendant.
118. In the premises, counsel for the 2nd Interested Party has submitted that it is the Plaintiff herein who has breached the contract between himself and the Defendant, including attempting to sell the suit plot, whilst the 2nd Interested Party in is occupation and possession thereof.
119. Finally, the counsel for the 2nd Interested party has submitted that the Plaintiff herein in not entitled to the reliefs sought at the foot of the Plaint or at all.
120. Owing to the foregoing submissions, Learned counsel for the 2nd Interested Party has therefore implored the Honourable court to dismiss the Plaintiff's suit.
121. In support of the foregoing submissions, counsel for the 2nd Interested Party has cited and relied on various decisions, inter-alia, *Charles Mwangi Miriti versus Thananga Tea Growers Sacco Ltd & Another (2014)eKLR*, *Nguruman Limited versus Jan Bonde Nielsen (2014)eKLR* and *Mrao Limited versus First American Bank of Kenya Ltd & Others (2003)*.

Issues for Determination:

122. Having reviewed the Plaint dated the April 20, 2011, the Statement of Defense and Counter-claim dated the February 6, 2013, the Statement of Defense on behalf of the 1st Interested Party dated the July 3, 2015; and having reviewed the written statement filed on behalf of the Parties, as well as the Oral Evidence tendered and having similarly considered the Written submissions filed, the following issues do arise and are pertinent for Determination;
 - I. Whether an Interested Party or better still, Interested Parties, can file Statement of Defense and by extension (sic) precipitate/ accrue orders adverse to the ones sought by the Principal Parties.
 - II. Whether the Plaintiff herein has proved and/or established ownership rights to and in respect of the suit Property to warrant the Reliefs sought.
 - III. Whether the Sale Agreement between the Plaintiff and the Defendant, if at all, was lawfully and legally terminated prior to (sic) the purported sale in favor of the 1st Interested Party.

Analysis and Determination

ISSUE NUMBER 1 - Whether an Interested Party or better still, Interested Parties can file Statement of Defense and by extension (sic) precipitate/ accrue orders adverse to the one sought by the Principal Parties.

123. It is common ground that at the onset, there were only two parties in the subject suit. For clarity, the suit was filed by the Plaintiff as against the Defendant vide Plaint dated April 20, 2011.
124. Nevertheless, after filling of the subject suit, the 1st and 2nd Interested Parties filed various applications, seeking to be joined in the matter as Interested Parties.
125. For coherence, the applications filed and/or mounted by the Interested Parties were heard and allowed. Consequently, the 1st and 2nd Interested parties were duly admitted as such Interested Parties.
126. Though at the time of their admission as interested parties, no liberty was granted for same to file Statement of Defense, it is appropriate to state the 1st Interested Party herein indeed proceeded to and filed a Statement of Defense.



127. Suffice it to note that vide the Statement of Defense on behalf of the 1st Interested Party, same has made various claims, inter-alia, that same is the lawful and beneficial owner of the suit plots.
128. Other than the foregoing, the 1st Interested Party has also contended that the Honourable court ought to make orders in his favor and essentially, to declare that same is lawfully entitled to the suit plots. Further, the 1st Interested Party has also claimed that the Defendant and the 2nd Interested Party are illegally in occupation of his plots.
129. On his part, the 2nd Interested Party has contended that the suit plots were jointly bought by himself and the Defendant and that despite the fact that same are now estranged, the Honourable court ought to declare that same (2nd Interested Party) is indeed entitled to the Suit Plots.
130. From the foregoing, it is evident and apparent that the 2 Interested Parties are both laying claim and/or entitlement to the suit plots. Simply put, the two Interested Parties are themselves seeking precipitate and primary orders, which are by their nature adverse to the reliefs sought by the Principal Parties.
131. Given the foregoing, the question that begs the answer is therefore; whether an Interested Party can file a Statement of Defense and whether an Interested Party can seek any precipitate order, in a suit where same is impleaded or is joined as such.
132. Before venturing to answer the twin issues alluded to in the preceding paragraph, the entry point is by appreciating, who then is an Interested Party.
133. To my mind, the answer to this question is discernible and apparent from the dicta of the Supreme Court of Kenya vide the case of *Trusted Society of Human Rights Alliance versus Mumo Matemu & 5 Others, Supreme Court Petition No 12 of 2013, [2014] eKLR*, where the court stated and observed as hereunder;

' (13) While the Rules have a definition of who an amicus is, there is no definition attributed to 'Intervener' or 'Interested Party'. However, from Rule 25 above, one is allowed to apply to be enjoined any time in the course of the proceedings.

'[14] *Black's Law Dictionary, 9th Edition*, defines 'intervener' (at page 897) thus:

'One who voluntarily enters a pending lawsuit because of a personal stake in it' and defines 'Interested Party' (at p 1232) thus:

'A party who has a recognizable stake (and therefore standing) in a matter'.

'[15] On the other hand, an amicus defined in Black's Law Dictionary thus:

'A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter'.

(34) With that definition of 'interested party,' the Court proceeded to hold further [paragraphs 17-18]:

'[17] Suffice it to say that while an interested party has a 'stake/interest' directly in the case, an amicus's interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.



'[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.'

134. From the foregoing decision, it is evident that an Interested Party is one who has a stake in respect of the issue or matter in dispute and is keen to champion the stake before the Honourable court. In this regard, such a Party is entitled under the law to seek for and obtained Leave to be joined as such.
135. Nevertheless, the critical question is whether a person or party joined as an Interested Party can raise precipitate claims and seeks adverse/ primary orders in a suit where same has been joined as such, to wit, as an Interested Party.
136. To my mind an Interested Party, despite having a stake in the suit, same cannot seek to generate own cause of action or otherwise bring forth claims, which are diametrically opposed to the ones ventilated by the Principal Parties.
137. As pertains to this legal position, it apt to take cognizance of the dictum of the Supreme Court of Kenya vide the decision in the case of Francis Kariuki Muruatetu & another versus Republic & 5 others [2016] eKLR, where the court stated and observed as hereunder;
 - (41) Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties.

Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.
 - (42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.
138. Based on the foregoing Jurisprudential explication, it is my finding and holding that despite having been joined as Interested Parties, the 1st and 2nd Interested Parties herein were not at liberty to ventilate and/or address claims, which are adverse and/or contrary to the Reliefs addressed by the Principal Parties.
139. Consequently, the claims by and/or on behalf of both Interested Parties, each one of whom sought to have the Honourable court declare same as the legitimate owners of the suit Plots, are not only premature and misconceived but legally untenable.
140. In a nutshell, I come to the conclusion that neither of the Interested Parties herein can be declared to be the legitimate or otherwise the beneficial owners of the suit property.



141. Suffice it to also observe, that if a Party is keen to lay a claim to a property that is in dispute and wherein same has not been joined, then it behooves the said Party to either chose to be joined as a Co- Plaintiff or Co- Defendant.
142. In this regard, the person joined will become a Principal Party as of right and shall therefore be at liberty to seek precipitate claims and/or reliefs, without legal limitation or hindrance.
143. Perhaps, it is opportune to invite the attention of Learned Counsel for the Interested Parties to the provision of Order 1 rule 3 of the Civil Procedure Rules which provides as hereunder;
 3. Who may be joined as defendants [Order 1, rule 3.]

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.
144. Additionally, Learned Counsel for the Interested Parties would similarly have applied the provisions of Order 1 Rule 10(1) and (2) of the Civil Procedure Rules, 2010 and seek to be joined as additional Plaintiffs, depending on the nature of their claim or stakes.
145. Notwithstanding the foregoing, I come to the conclusion that the issues and claims raised by both the 1ST and 2nd Interested Parties are misplaced and misconceived.
146. In a nutshell, the claims by the 1st and 2nd Interested Parties be and are hereby Dismissed.

Issue Number 2 - Whether the Plaintiff herein has proved and/or established ownership rights to and in respect of the suit Property to warrant the Reliefs sought.

147. Vide the subject suit, the Plaintiff herein has sought to be declared as the lawful and legitimate owner of the suit property, comprising of the suit plots, the latter which were hitherto sold to the Defendant vide memorandum dated the July 17, 2003.
148. To the extent that the Plaintiff herein is seeking orders pertaining to and/or concerning the suit property, it was incumbent upon the Plaintiff to place before the Honourable court sufficient and credible evidence to inter-alia, Certificate of title or ownership of the suit property.
149. For coherence, the burden of proving that the Plaintiff herein is the lawful and legitimate owner of the Suit property laid at the doorstep of the Plaintiff. Simply put, he who asserts proves. See Section 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya.
150. Being alive to the Burden of proof and ofnwhom same lies, it is now appropriate to discern whether the Plaintiff placed before the Honourable court the requisite evidence.
151. First and foremost, it was the Plaintiff's evidence that same bought and/or purchased the suit plots from Njiru Githungui Farm Ltd, in the year 1998, but the formal transfer has not been done to date. However, the Plaintiff continued and stated that same was issued with share certificate awaiting formal transfer.
152. Further, the Plaintiff also testified that upon purchase of the suit Property, same entered upon and took possession thereof and thereafter commenced to subdivide the suit Property into plots with an intention of latter selling the plots after formal transfer from Njiru Githugui Farm Ltd.



153. Other than the foregoing, the Plaintiff herein stated during cross examination by counsel for the 2nd Interested Party that same did not bring forth any Evidence and/or document to show the current registration status in respect of the suit plots.
154. Nevertheless, the Plaintiff further testified whilst on cross examination that though he is aware that the suit property is duly registered at the Land Registry, he did not procure and/or obtain any extract of title of Certificate of official search.
155. Further, the Plaintiff also stated during cross examination that the suit plots, which are the subject of the proceedings herein now belong to the 1st Interested Party. Perhaps, it is appropriate to reproduce the words of the Plaintiff as hereunder;

' The property now belongs to the 1st interested party. The 1st Interested Party is now the owner of the suit property'

156. Notwithstanding the foregoing, during the re-examination, the Plaintiff herein took a diametrically adverse position and stated that the suit property belongs to his Father.
157. However, the Plaintiff continued that despite the suit property belonging to his Father, same has total rights to deal with the Suit Property.
158. Other than the foregoing, the Plaintiff also conceded that even though the suit property belongs to his Father, who was reported to be deceased, same had not taken Grant of letters of administration.
159. At any rate, the Plaintiff also admitted that he had no Power of Attorney to act for and on behalf of his Father, that is assuming that a Power of Attorney, would be lawful in such a situation.
160. From the foregoing evidence which fell from the lips of the Plaintiff, the question is whether the Plaintiff established Ownership over and in respect of the suit property to warrant favorable order.
161. In my considered view, ownership or title to land and property only accrues upon issuance of a legitimate title to and in favor of the concerned person. Only then, can a person propagate a situation and/or a claim as the registered owner of the designated Property.
162. However, by the Plaintiff's own admission no formal transfer in respect of the suit property has hitherto been made to and in his favor by Njiru Githungui Farm Ltd, if at all.
163. On the other hand, the same Plaintiff is the one who has stated that the suit property belongs to his Father and not himself.
164. If it is true, that the suit property belongs to his Father and for which no evidence has been adduced, then wherefrom does the Plaintiff accrue legal rights over a property that is admittedly not his.
165. Worse still, the same Plaintiff is on record as stating that after selling the suit plots to the 1st Interested Party, same, that is the 1st Interested Party became the absolute owner of the suit plot.
166. Surely, if the sale in favor of the 1st Interested Party conferred upon the 1st Interested Party absolute rights over the suit plot (which is equally debatable), then can the Plaintiff continue to have any rights over the property.
167. To my mind, the Plaintiff herein has been approbating and reprobating at the same time and as a result of the contradictory evidence tendered, it is not possible to find any credible basis to render a Judgment in favor of the Plaintiff.



168. Elsewhere herein before, I pointed out that the burden of proof in a case lies on the Plaintiff and the burden is not diminished even when the Plaintiff's case is not opposed and or defended.
169. To vindicate the foregoing hackneyed and established position, it is apt to take cognizance of the dictum in the holding in the case of *Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & another [2014] eKLR*, where the Court of Appeal stated as hereunder;

' With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence , when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the *Evidence Act* to be demanding of a party like the 1st respondent that:

'The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.'

That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred was also not proved. Accordingly, the learned judge fell in error to assume that those facts indeed existed.

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

170. Premised on the foregoing decision, I find and hold that in the absence of any extract of title or certificate of official search, showing the ownership in respect of the suit property, it is not legally tenable to hold in favor of the Plaintiff.
171. In any event, the approbation and reprobation, by the Plaintiff in the course of his testimony, does not also help the situation herein.
172. In a nutshell, I come to the conclusion that the Plaintiff has neither proved nor established his entitlement to the suit property, to warrant the grant of the reliefs sought at the foot of the Plaintiff.

Issue Number 3

Whether the Sale Agreement between the Plaintiff and the Defendant, if at all, was lawfully and legally terminated prior to (sic) the purported sale in favor of the 1st Interested Party.

173. In the course of his testimony before the court, the Plaintiff herein conceded that same was approached by the Defendant who expressed an interest to purchase two plots, namely plots number 15 and 17, arising out of the suit property.
174. Further, the Plaintiff also testified that arising from the approach, same reached an agreement for the sale of the two plots to and in favor of the Defendant in the sum of Kshs 325, 000/= only.
175. At any rate, the Plaintiff further testified that same was paid a total of Kshs 290, 000/= only, leaving a balance of Kshs 35, 000/= only, due, owing and payable.



176. Suffice it to note, that the payment of the sum of Kes 290, 000/= only, was duly acknowledged vide a written memorandum, duly signed by both the Plaintiff and the Defendant.
177. Other than the foregoing, it is worthy to note that the written memorandum, wherein the Plaintiff acknowledged receipt of Kshs 290, 000/= only, also stated that the balance of Kshs 35, 000/= was to be paid latter.
178. Even though it was stated that the balance of Kshs 35, 000/= only, was to be paid latter, what constitutes latter, was never defined and/or circumscribed.
179. Notwithstanding the open-ended nature of the clause, relating to the payment of the balance of the purchase price, that is Kes 35, 000/= only, the Plaintiff herein stated that because the Defendant did not pay the said balance same proceeded to and sold the suit plots to the 1st Interested Party.
180. Assuming that indeed the Plaintiff sold the suit plots to the 1st Interested Party despite the findings in respect of the second issue herein, the question is; was that transaction between the Plaintiff and the Defendant still in existence or had it been terminated.
181. Because of the open-ended clause relating to the payment of the balance of the purchase price, it was incumbent upon the plaintiff, if same was keen to terminate the agreement/arrangement, to issue and serve the requisite termination or repudiation notice on the Defendant.
182. It is important to point out that the termination/repudiation notice would intimate to the Defaulting Party the nature of the breach complained of and there after called upon the Defaulting Party to remedy the Default/Breach within a reasonable timeframe.
183. In respect of the subject matter, the Plaintiff stated as hereunder;
- ' I did not give the Defendant a notice of termination. I just terminated the sale of the land without giving the Defendant any notice.'
184. Given the explicit admission by the Plaintiff herein, can it be said that the sale agreement or mutual understanding relating to the sale of the suit properties with the Defendant was lawfully terminated.
185. To my mind, without issuance of the requisite termination/repudiation notice, the Plaintiff was not at liberty to purport to terminate the said Agreement/arrangement denoted vide the Memorandum dated the July 17, 2003.
186. In short, it is my finding and holding the said sale agreement/mutual understanding between the Plaintiff and the Defendant pertaining to the sale of the two plots remained in existence.
187. As far as the law on termination or repudiation of contracts is concerned, it is appropriate to adopt and apply the dictum in the case of *Sisto Wambugu versus Kamau Njuguna [1983] eKLR*, where the court of appeal cited with approval *Halsbury's Laws of England (4th Edn)* p 366, para 531 stated as hereunder;
- ' In cases where time is not originally of the essence of the contract, or where stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken.'



188. In the premises, by the time the Plaintiff was purporting to sell the two plots to and in favor of the 1st Interested Party, the previous arrangement between the Plaintiff and the Defendant remained in situ.

Final Disposition:

189. Having addressed, evaluated and analyzed all the issues outlined for determination and which were amplified in the body of the Judgment, I now come to the conclusion that the Plaintiff's claim is not meritorious.

190. Consequently and in the premises, I now make the following orders;

- I. The Plaintiffs suit be and is hereby Dismissed for want or lack of Merits.
- II. The Defendant's Counterclaim be and is hereby Dismissed for want of Prosecution.
- III. The claims by the 1st and 2nd Interested Parties be and are hereby dismissed for being misconceived, legally untenable and bad in law.
- IV. Each Party shall bear own Costs.

191. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Kevin Court Assistant

Mr. Owuocha for the Plaintiff.

Ms. Esami h/b for Nyamu for the 2nd Interested Party.

Mr. Andrew Obwayo for the 1st Interested Party

No appearance for the Defendant

